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Official Immunity in Federal Court: Supreme Court of Virginia v. Consumers Union of the United States Inc.

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NOTES

OFFICIAL IMMUNITY IN FEDERAL COURT: *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*

Doctrines of official immunity insulate state and federal executive, legislative, and judicial officers from judicial proceedings arising out of their performance of official duties.[1] These doctrines of official immunity have both explicit[2] and implicit[3] constitutional bases. Although the past decade has witnessed some erosion of the scope of executive and legislative immunity,[4] this trend has not produced a coherent principle for deciding immunity claims.[5] In *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*,[6] the Supreme Court held that the doctrine of legislative immunity bars a federal court from issuing an injunction against state court judges for promulgating rules regulating attorney conduct, but it failed to provide definitive standards for approaching claims of official immunity.

The Court's reasoning in *Consumers Union* may support several extensions of official immunity. The decision suggests that state legislators enjoy some measure of immunity from federal court injunctions.[7] It might also provide state court judges with immunity from federal court injunctions relating to their adjudicatory functions.[8] Finally, the deci-

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1 Official immunity does not bar a claimant from filing a claim in federal court. It does, however, allow the official to obtain a dismissal of the charges at an early stage in the proceedings. *See* Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976).

2 The Speech or Debate Clause of the Constitution provides: "[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art. I, § 6.

3 The doctrines of separation of powers and federalism require a grant of official immunity. *See* note 15 and accompanying text *infra*.

4 *See, e.g.,* United States v. Gillock, 445 U.S. 360 (1980) and notes 58-64 and accompanying text *infra*; Butz v. Economou, 438 U.S. 478 (1978) and notes 101-03 and accompanying text *infra*; Scheuer v. Rhodes, 416 U.S. 232 (1974) and notes 90-97 and accompanying text *infra*; United States v. Brewster, 408 U.S. 501 (1972) and note 41 and accompanying text *infra*. *See generally* Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 284-85.

5 Recent official immunity cases do not present consistent standards or methodologies for evaluating official immunity claims. Typically, the Supreme Court cites previous official immunity cases for the proposition that liability would threaten the independence of the defendant governmental body. *See* notes 16-19 and accompanying text *infra*. The Court then determines whether the interests involved in the instant case require a grant of immunity. The Court generally presents its determination as a bare conclusion, usually granting the defendant officials immunity, but occasionally withholding it.

6 446 U.S. 719 (1980).

7 *See* notes 135-54 and accompanying text *infra*.

8 *See* notes 155-65 and accompanying text *infra*.

sion might provide to state and federal executive officials charged with rulemaking responsibilities immunity from claims brought against them in federal court.[9] Proper consideration of the constitutional basis of official immunity,[10] however, supports a narrow reading of the Court's decision.

I

OFFICIAL IMMUNITY

A. *Rationale for Official Immunity*

The goal of providing redress for violations of constitutional rights creates a presumption in favor of official liability.[11] The federal courts are restrained, however, in cases involving state or federal officials; the Constitution sets out structural arrangements requiring some degree of official immunity[12] to prevent the federal judiciary from interfering with

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9 *See* notes 166-69 and accompanying text *infra*.

10 This Note discusses the sources of official immunity almost exclusively in constitutional terms. Although the Supreme Court has relied on common law principles in sustaining claims of official immunity, *see* Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871) and notes 76-81 and accompanying text *infra*; *see generally* Nagel, *Judicial Immunity and Sovereignty*, 6 HASTINGS CONST. L.Q. 237, 245 n.43 (1978), most cases treat official immunity as an issue of statutory construction under the Civil Rights Act, 42 U.S.C. § 1983 (1976), because this Act provides the statutory authority for official liability. *See, e.g.,* Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951) and notes 46-52 and accompanying text *infra*.

Notwithstanding the reliance on statutory and common law principles in official immunity cases, discussion of official immunity in constitutional terms is not inappropriate. All justifications for official immunity involve, at their core, judicial interference with the activities of other governmental entities. Neither the Civil Rights Act nor the common law provides any readily ascertainable standards for determining the propriety of judicial action. In contrast, the constitutional doctrines of federalism and separation of powers provide relatively clear standards for making this determination. *See* notes 20-26 and accompanying text *infra*. Incorporation of the constitutional doctrines provides a clearer statement of the parameters of official immunity than do the inconclusive legislative history of the Civil Rights Act or judicial pronouncements of common law. Under this view, the continued reference to official immunity as a question of statutory construction should be interpreted as an implied recognition of the principle that courts should avoid constitutional issues wherever possible. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (" '[I]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question will be avoided,' Crowell v. Benson, 285 U.S. 22, 62.").

11 *See* Butz v. Economou, 438 U.S. 478, 485-86 (1978) (complaint alleging constitutional rights violations by federal officials states a cause of action compensable in damages); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390-97 (1971) (same); Bell v. Hood, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safegnarded by the Constitution . . . . [F]ederal courts may use any available remedy to make good the wrong done.") (footnotes omitted); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

12 Significantly, the Constitution does not specify the extent of immunity necessary to preserve its structures. Until recently, the Court considered absolute immunity the only alter-

the operation of other state and federal governmental bodies.[13] In balancing these conflicting interests, a federal court considering a claim of official immunity must engage in a two-tiered inquiry. On the first tier, the court must determine the level of interference with the operation of other governmental bodies that a holding of liability will cause. On the second tier, the court must determine whether the Constitution permits that level of interference. Under the first-tier analysis, similar considerations apply to claims against state and federal officials.[14] On the second tier, however, the distinction between federalism analysis and separation of powers analysis suggests differences betwcen the scope of immunity for state and federal officials.[15]

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native to official liability. In the past decade, however, it has adopted qualified immunity, *see* note 97 and accompanying text *infra*, as another alternative. *See, e.g.,* Butz v. Economou, 438 U.S. 478 (1978) and notes 98, 101-03 and accompanying text *infra*; Scheuer v. Rhodes, 416 U.S. 232 (1974) and notes 90-97 and accompanying text *infra*. This development, which cannot be viewed as constitutionally compelled, has created the possibility of a range of immunities.

13 The Constitution assigns a limited role to the federal judiciary in the governmental structure—that of detcrmining the law. The judicial power does not extend to controlling the official conduct of the coordinate branches of the federal government. *See* notes 20-22 and accompanying text *infra*. Different concerns limit the federal judiciary's power with respect to the states. In this arca, the limits on the power of the federal government and the federal judiciary operate to preserve the sovereignty of the states. *See* notes 23-26 and accompanying text *infra*.

Professor Weinberg has articulated the fundamental structural problem associated with federal court enforccment of constitutional prohibitions against state officials. *See* Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1197-1205 (1977). The states must administer their affairs within the bounds of the Constitution. At the same time, respect for the states' position in the federal structure requires federal courts to recognize the states' capacity to protect constitutional rights. These two postulates of American constitutionalism come into confiict when a federal court is called upon to adjudicate a claim against a state for a violation of constitutional rights. In an earlier era, concern with the abuse of the federal courts' equitable jurisdiction over the states led to the adoption of the Anti-Injunction Act, 28 U.S.C. § 2283 (1976), and the eleventh amendment. Professor Weinberg argnes that "the Civil War settled the fundamental constitutional question whether the Union could impose national standards upon the states," Weinberg, *supra*, at 1197-98, and that the Civil Rights Act of 1871, § 1, 38 Stat. 730 (1871) (current version at 42 U.S.C. § 1983 (1976)), gave the federal courts jurisdiction over claims of state deprivations of civil rights. Weinberg, *supra*, at 1198. See generally *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1149-53 (1977), arguing that the Reconstruction Congress preferred federal court action to enforce civil rights.

Civil liability is not the only potential source of conflict between the judiciary and the other branches; judicial review limits the independence of government officials by limiting the finality of their decisions. Through judicial review, the courts set restraints within which officials must act. Where a court exercises its powers of judicial review aggressively, it can effectively control individual officials' actions. *See generally* THE FEDERALIST No. 48 (J. Madison) (Cooke, ed. 1961).

14 This inquiry centers on an issue of fact: the extent of the interference with the officials' conduct. Because state legislators and members of Congress use similar procedures in discharging their official responsibilities, they will be similarly affected by judicial interference. *See generally* Tenney v. Brandhove, 341 U.S. 367, 372-75 (1951).

15 This inquiry centers on an issue of law: the constitutionally permissible level of judicial interference. On the second tier, the similarity between state and federal officials dis-

On the first tier, judicial review of official conduct presents four considerations that militate in favor of official immunity. First, imposition of personal liability upon officials duty-bound to perform the acts giving rise to the claim would deter qualified individuals from entering government service.[16] Second, representative government requires official immunity to prevent the threat of personal liability from improperly influencing the decisions of government officials exercising their discretionary powers.[17] Third, defending against personal liability claims would distract officials from performing their public duties.[18] Finally, judicial review might disrupt government efforts to conduct official business.[19]

On the second tier, the doctrine of separation of powers limits a federal court's inquiry in suits involving Congress or the executive

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solves because the legal consequences of separation of powers analysis and federalism analysis differ. *See* notes 20-26 and accompanying text *infra*.

16 Personal liability may create an uncomfortable dilemma for government officials. See Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), in which Judge Learned Hand stated:

> Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put . . . to satisfy a jury of his good faith. [Although official misconduct should be punished, it is] quite another matter [to expose officials who] have been honestly mistaken to suit by anyone who has suffered from their errors.

Id. at 581. Under such circumstances, many qualified individuals may choose not to enter government service. This would hinder the ability of governmental bodies to discharge their duties. *See* Wood v. Strickland, 420 U.S. 308, 331 (1975) (Powell, J., dissenting in part).

17 In Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutor absolutely immune from damage claim arising under § 1983), the Court stated:

> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.

Id. at 424-25. In this manner, official liability impairs the state or federal government's ability to conduct its affairs through official action. *But see Developments*, *supra* note 13, at 1202 (arguing that granting absolute immunity to all discretionary decisionmakers "would wholly and impermissibly undermine the section 1983 damage action.").

18 In Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (members of Congress immune from suit for injunction brought under § 1983), the Court noted that defense of "a private civil action . . . creates a distraction and forces Members [of Congress] to divert their time, energy, and attention from their legislative tasks . . . ." *Id.* at 503. *See also* Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U.L. REV. 526, 529-30 (1977).

19 The Supreme Court has emphasized the importance of preventing judicial interference with the conduct of other governmental bodies. In Eastland v. United States Servicemen's Fund, 421 U.S. 491, 511 (1975), the Court stated:

> This case illustrates vividly the harm that judicial interference may cause. A legislative inquiry has been frustrated for nearly five years, during which the Members . . . have been distracted from the purpose of their inquiry. The [Speech or Debate] Clause was written to prevent the need to be confronted by such "questioning . . . ."

For a critique of this argument, see *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 136-39 (1975).

branch.[20] Where a federal court finds a "textually demonstrable constitutional commitment of [an] issue to a coordinate political department," the separation of powers doctrine prohibits the exercise of federal judicial power.[21] The exercise of judicial review would amount to judicial control over a coordinate branch's actions, a condition generally unacceptable under separation of powers doctrine.[22]

The separation of powers doctrine has no effect upon federal courts' power in suits involving state officials;[23] rather, the relevant concern is

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20 The Supreme Court has addressed this issue in its consideration of the justiciability of political questions. Justiciability is a threshold issue to be decided before a court addresses the merits of a particular controversy. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 240-41 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]; *id.* at 95-96 (Supp. 1981). *See generally* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 538-39 (1966); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9-10 (1959).

21 Baker v. Carr, 369 U.S. 186, 217 (1962). The political question doctrine prevents a court from substituting its own judgment for that of another branch of government. *See id.* at 210 (quoting Coleman v. Miller, 307 U.S. 433, 454-55 (1939)): "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations."

Thus, judicial action is inappropriate when an issue arises regarding the propriety of another branch's judgments. *But see* Powell v. McCormack, 395 U.S. 486 (1969) (political question doctrine does not bar judicial review of Congress's determination of its members' qualifications). *Powell* demonstrates the distinction between congressional action and congressional discretion. The political question doctrine applies only where Congress has made a discretionary judgment. *See generally* HART & WECHSLER, *supra* note 20, at 234-35.

22 *See* THE FEDERALIST No. 48, at 332 (J. Madison) (Cooke ed. 1961):

> It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and compleatly administered by either of the other departments . . . [none] of them ought to possess . . . an overruling influence over the others in the administration of their respective powers.

But see United States v. Nixon, 418 U.S. 683 (1974), in which the Court recognized a presidential privilege but held that

> when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

Id. at 713. *United States v. Nixon* applies only when a court finds a confiict between competing claims of two branches of government. In this situation, the Court seeks "the least restrictive means of reconciling the powers of both branches. This [is] accomplished by comparing the relative degrees of intrusions into the classically defined functions of the competing branches." Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 698 (1978). For a detailed overview of the separation of powers thcory, see *id.* at 661-706.

23 "[T]he separation-of-powers principle, like the political-question doctrine, has no applicability to the federal judiciary's relationship to the States." Elrod v. Burns, 427 U.S. 347, 352 (1976). "[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'" Baker v. Carr, 369 U.S. 186, 210 (1962). For a contrary view, see *id.* at 278-97 (Frankfurter, J., dissenting).

federalism. Like separation of powers analysis, federalism analysis seeks to limit the disruptive effect of federal court action on other sovereign governmental bodies.[24] Federalism, however, does not always preclude federal court disruption of state governmental activity; federal interests carry great weight.[25] Given the federal responsibility for gnaranteeing constitutional rights, interests of comity generally will yield where state action violates the Constitution.[26]

In *Younger v. Harris*,[27] the Supreme Court considered the requirements of federalism in an area analogous to official immunity—a federal injunction to prevent violation of a defendant's constitutional rights in a pending state criminal proceeding.[28] In *Younger*, the defendant alleged that a pending prosecution threatened his constitutional rights. The prosecutors responded that an injunction would unjustifiably interfere with the state's ability to enforce its laws.[29] A divided Court determined that an injunction prohibiting further state court proceedings was improper, holding that "the normal thing to do . . . is not to issue such

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24 *See, e.g.,* National League of Cities v. Usery, 426 U.S. 833 (1976) (federal government may not require payment of minimum wage to state employees because of interference with state's ability to set its own policy priorities); Younger v. Harris, 401 U.S. 37 (1971) (federal court generally may not enjoin pending state prosecution because of interference with state's ability to enforce its own laws).

25 The issues involved in the conflict between federal supremacy and state sovereiguty are discussed in note 13 *supra*.

26 *See, e.g.,* City of Rome v. United States, 446 U.S. 156, 179 (1980) ("[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments."); Milliken v. Bradley, 433 U.S. 267, 291 (1977) ("The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment . . . . Nor are principles of federalism abrogated . . . ."); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("We think that the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of . . . the Fourteenth Amendment."). *See generally* P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 66-68 (4th ed. Supp. 1980).

27 401 U.S. 37 (1971). The defendant Harris had been indicted for violations of a California statute. He sought a federal injunction barring the state prosecution, argning that the underlying statute contravened the first amendment's guarantee of free speech. A three-judge district court issued the injunction. Harris v. Younger, 281 F. Supp. 507, 509 (C.D. Cal. 1968). On appeal, a closely divided Supreme Court reversed, dissolving the injunction. 401 U.S. 37 (1971).

28 A federal court injunction against a pending state criminal prosecution poses a thrcat to the sovereignty of the state. If a state cannot enforce its own laws, then it has lost a substantial element of its sovereiguty: the ability to regulate "socially harmful conduct that the State believes in good faith to be punishable." Younger v. Harris, 401 U.S. 37, 51-52 (1971). Similarly, when a federal court controls the actions of state officials, it poses a threat to state sovereignty by indirectly controlling the activities of the state. Of course, a case involving an injunction against state criminal prosecutions may be distingnishable from a case involving an injunction against a state official because of the different identities of the defendants. This distinction, however, misses the critical issue: the interference with a state's ability to control its own affairs.

29 *Id.* at 39-40.

injunctions."[30] Subsequent decisions have reaffirmed this aversion to federal court injunctive relief,[31] although the Court has upheld the issuance of injunctions when the defendant has demonstrated a great and immediate threat of irreparable harm.[32] *Younger* has not compromised

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30 *Id.* at 45. Citing the terms of the Anti-Injunction Act, 28 U.S.C. § 2283 (1976), the Court found a "longstanding public policy against federal court interference with state court proceedings." 401 U.S. at 43. The Court identified concerns of equity, comity, and "Our Federalism" as the basis of this public policy. *Id.* at 43-44. The Court stated:

> The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44. *See generally* note 13 *supra*.

31 The *Younger* doctrine presents two independent grounds for denying federal court injunctive relief against state judicial proceedings: absence of the requisite harm for invoking the federal court's equitable jurisdiction and impermissible interference with a state judicial proceeding. In the absence of a pending state proceeding, the federal court still must scrutinize the facts to determine whether a substantial threat of great and immediate harm exists. *See, e.g.,* O'Shea v. Littleton, 414 U.S. 488 (1974) (alleged illegal bond-setting, sentencing, and jury management practices do not sufficiently affect plaintiffs not subject to pending criminal prosecution to constitute requisite irreparable injury); Boyle v. Landry, 401 U.S. 77 (1971) (threat of future prosecution under challenged statute does not sufficiently affect plaintiffs not subject to pending criminal prosecution). The *Younger* doctrine also bars federal court injunctions against an expanding array of state judicial proceedings. *See, e.g.,* Moore v. Sims, 442 U.S. 415 (1979) (injunction against pending civil child custody proceeding); Juidice v. Vail, 430 U.S. 327 (1977) (injunction preventing enforcement of state civil contempt judgment); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (injunction against civil public nuisance proceeding); Perez v. Ledesma, 401 U.S. 82 (1971) (suppression order of allegedly illegally seized evidence to be used in pending state criminal proceeding); Samuels v. Mackell, 401 U.S. 66 (1971) (declaratory and injunctive relief in pending state criminal proceeding). As a general rule, "Younger is presumptively applieable to any state proccedings in which the state is seeking to enforce important public policies." HART & WECHSLER, *supra* note 20, at 281 (Supp. 1981). *See generally id.* at 1042-50 (2d ed. 1973), 277-86 (Supp. 1981); Note, Younger *Grows Older: Equitable Abstention in Civil Proceedings*, 50 N.Y.U. L. REV. 870, 877-78 (1975).

32 *Younger* does not bar a federal court injunction where a constitutional claim cannot adequately be considered in a state forum. The Supreme Court has found the state forum inadequate in three situations: (1) where the state action causing the alleged constitutional violation has taken place without any court proceeding, *see* Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975) (federal court may grant declaratory and injunctive relief to require states to conduct a hearing on issue of probable cause in which constitutional claims may be raised); (2) where the members of the state tribunal have a personal interest in the resolution of the constitutional claim, *see* Gibson v. Berryhill, 411 U.S. 564 (1973) (members' pecuniary interest in outcome renders state forum inadequate). *But see* Kugler v. Helfant, 421 U.S. 117 (1975) (injunctive relief unavailable where one member of state supreme court involved in alleged constitutional violation); (3) where the threat of state prosecution exists and the plaintiff can show a substantial threat of great and immediate harm, *see* Wooley v. Maynard, 430 U.S. 705 (1977) (plaintiff threatened with criminal prosecution may challenge underlying statute before state institutes criminal proceeding); Doran v. Salem Inn, Inc., 422 U.S. 922, 930-31 (1975). *But see* Hicks v. Miranda, 422 U.S. 332, 349 (1975) (federal injunction barred where state institutes criminal proceeding after filing of federal action but before federal action has progressed substantially). *See generally Developments*, *supra* note 13, at 1287-92.

the federal guarantee of constitutional rights, but has removed the guarantee of a federal court forum for the vindication of such rights.[33]

B. *Scope of Official Immunity*

Concern for the Constitution's inter- and intragovernmental structures has prompted the development of official immunity. Distinctions arise among the immunities extending to executive, legislative, and judicial officials because of the different functions and institutional arrangements of their respective offices.[34] Other distinctions exist between the immunity extending to state and federal officers, and the immunity granted in response to different types of judicial action.[35]

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33 *Younger* is a jurisdictional, not a substantive, doctrine. It does not allow state officials to violate constitutional rights with impunity; rather, it changes the forum in which the claim is litigated. A plaintiff is required to raise a claim of unconstitutional state action in a pending state proceeding, not in a collateral federal court action. The state court is presumed competent to adjudicate the constitutional claim. A federal court, however, will intervene upon a showing of inadequacy in the state court proceeding. *See generally* Monaghan, *The Burger Court and "Our Federalism,"* 43 LAW & CONTEMP. PROBS. 39, 44-46 (1980).

In Rizzo v. Goode, 423 U.S. 362 (1976), the Supreme Court asserted that the principles of federalism underlying the *Younger* doctrine barred a federal judge from issuing an order requiring elected city officials to prepare a program for dealing with civilian complaints of police misconduct. Citing a number of *Younger* doctrine cases, the Court emphasized the limitations upon federal courts' equitable powers over state officials. The Court concluded that the federal courts should limit their interference with the internal affairs of local governmental bodies. *Id.* at 377-81. *See also* Milliken v. Bradley, 433 U.S. 267, 280-81 (1977) (federal court remedial order for school desegregation must respect independent authority of local officials over administration of routine matters).

Rizzo represents a novel extension of the principles enunciated in *Younger* and its progeny. Unlike *Younger*, *Rizzo* contains a substantive element that limits the protection of constitutional rights. Given a situation in which a federal court would exercise jurisdiction to redress a constitutional violation under *Younger*, *Rizzo* raises another barrier to the vindication of constitutional rights by requiring a federal court to respect the authority of local officials in fashioning its remedy for a constitutional violation. *See generally* HART & WECHSLER, *supra* note 20, at 284 (Supp. 1981).

This Note relies on the jurisdictional rather than the substantive components of the *Younger* doctrine. Although the *Younger* doctrine militates against the exercise of federal equitable jurisdiction over state officials, it does not limit a federal court's authority to fashion a remedy for a constitutional violation after the court determines that federal jurisdiction should be exercised.

34 While not articulating any basis for their distinctions, the courts traditionally have distinguished the degree of immunity granted to various types of government officials. Some tendencies, however, are clear. The courts never have given much consideration to suits against judges. Claims against executive officials have met with considerably more success and claims against legislators have occupied an intermediate position.

The reasons for these distinctions remain unclear. Because improper interference with the conduct of other government officials remains the basis for all immunity doctrines, the susceptibility of the various officials to influence caused by judicial review is apparently the principal variable.

35 Judicial action may take the form of criminal prosecutions, civil actions for damages, or suits for injunctive or declaratory relief. Presumably, criminal prosecutions present the greatest threat of interference. *See* notes 37-38 and accompanying text *infra* (Speech or Debate Clause developed as a response to the threat of criminal prosecution). *But see* United States v. Gillock, 445 U.S. 360 (1980) (finding little justification for granting immunity from

1. *Legislative Immunity*

The Speech or Debate Clause of the Constitution[36] provides members of Congress with virtually absolute immunity from liability for claims arising from their legislative activities. In light of the history of legislative intimidation by the Stuart monarchs,[37] the Founding Fathers adopted this absolute immunity to preserve Congress's position in the power structure.[38] In its initial interpretation of the Clause, the Supreme Court extended congressional immunity from damage claims "to things generally done in a session of the House by one of its members in relation to the business before it."[39] This application emphasizes the Clause's role in preserving the independence of legislative processes.[40]

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prosecution under a federal criminal statute). The Supreme Court views damage claims as the next greatest threat of interference, followed by injunctions. *Compare* Kilbourn v. Thompson, 103 U.S. 168 (1880) (members of Congress absolutely immune from damage action) *and* Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (Court has more difficulty finding members of Congress absolutely immune from injunctive relief) *with* Scheuer v. Rhodes, 416 U.S. 232 (1974) (state executive officials have qualified immunity from damages), *and Ex parte* Young, 209 U.S. 123 (1908) (state executive officials subject to federal court injunctions). Rejecting state legislative immunity from injunctions while granting it for damage actions might be criticized because an injunction acts as an absolute bar to official activity whereas damages act only as a deterrent. *But see* Schuck, *supra* note 4, at 281 n.1. The Court may find that declaratory relief poses a less substantial threat of interference than injunctive relief. *Cf.* Steffel v. Thompson, 415 U.S. 452, 462 (1974) (declaratory relief distinguished from injunctive relief under *Younger* doctrine because such federal relief would not interfere with state action in progress).

36 "[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art. I, § 6.

37 Legislative privilege developed out of the seventeenth century conflict over primacy between the King and Parliament. During this period, the King systematically harassed prominent members of Parliament by instituting criminal prosecutions based on their legislative acts. For an excellent treatment of this subject, see Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1122-35 (1973).

38 James Wilson, in an oft-quoted passage, stated:

> In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.

1 WORKS OF JAMES WILSON 421 (McCloskey ed. 1967). The Supreme Court has viewed the Speech or Debate Clause as serving "to prevent intimidation [of members of Congress] by the executive and accountability before a possibly hostile judiciary." United States v. Johnson, 383 U.S. 169, 181 (1965). *See* United States v. Helstoski, 442 U.S. 477, 491 (1979) (Clause's "purpose was to preserve the constitutional structure of separate, coequal, and independent branches of government."). James Madison wrote that "the reason and necessity of the privilege must be the guide" in interpreting the Speech or Debate Clause. 4 WRITINGS OF JAMES MADISON 221 (Hunt ed. 1910).

39 Kilbourn v. Thompson, 103 U.S. 168, 204 (1880) (Speech or Debate Clause is defense to tort action brought against members of House of Representatives for false imprisonment arising out of imprisonment by House for contempt).

40 In Kilbourn v. Thompson, 103 U.S. 168 (1880), the Court broadly interpreted the Speech or Debate Clause to fulfill the purposes of the Clause. By its terms, the Speech or Debate Clause does not extend immunity to legislative activities other than speeches made during a session of Congress. Considering, however, the historical development of the Clause,

More recent decisions have narrowed the types of business related acts protected by legislative immunity.[41]

The Supreme Court extended congressional immunity to suits for injunctive relief in *Eastland v. United States Servicemen's Fund*.[42] As with damage claims, in actions for injunctive relief "judicial power is still brought to bear on Members of Congress and legislative independence is imperiled."[43] The Speech or Debate Clause and the separation of pow-

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see notes 37-38 *supra*, the Court interpreted it to provide a blanket immunity for all congressional processes. The Court's definition protects Congress's use of any procedures germane to the accomplishment of its legislative responsibilities. *Kilbourn* restricts the immunity only where members of Congress use extraordinary procedures or are not involved in activities related to the legislative process.

41 *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111 (1979) (Speech or Debate Clause inapplicable to congressional dissemination of information through press releases or newsletters); Doe v. McMillan, 412 U.S. 306 (1973) (Speech or Debate Clause inapplicable to public dissemination of materials that infringe upon individual privacy); Gravel v. United States, 408 U.S. 606 (1972) (Speech or Debate Clause inapplicable to an arrangement for private publication of classified government documents); United States v. Brewster, 408 U.S. 501 (1972) (Speech or Debate Clause does not bar criminal proseeution of former Senator if charges do not require inquiry into legislative acts or motivation).

Hutchinson, *Doe*, and *Gravel* draw a distinction between Congress's authority to inform itself regarding governmental affairs and its authority to inform the public about these affairs, limiting legislative immunity to the former category of activities. *See* Gravel v. United States, 408 U.S. at 625-26. This distinction has been criticized as failing to recognize Congress's role in informing the public. *See id.* at 636-37 (Douglas, J., and Brennan, J., dissenting). For a critical account of these decisions, see Erwin, *The* Gravel *and* Brewster *Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175 (1973). Congress's role in informing the public has long been recognized. *See* Gravel v. United States, 408 U.S. at 650-51 (Brennan, J., dissenting); THE REORGANIZATION OF CONGRESS, A REPORT OF THE COMMITTEE ON CONGRESS OF THE AMERIGAN POLITICAL SCIENCE ASSOCIATION 14 (1945) ("With the decline of Congress as an original source of legislation, this function . . . of keeping public opinion in touch with the conduct of the government becomes increasingly important . . . . Congress serves as a forum through which public opinion can be expressed, general policy discussed, and the conduct of governmental affairs exposed and criticized."); W. WILSON, CONGRESSIONAL GOVERNMENT 303 (1885) ("It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees."). Congressmen may, for example, release information for the purpose of creating public support for legislation or to expose official misconduct, thereby remedying abuses without resorting to legislation. The Court's recent decisions appear to have lost sight of these rcalities of modern government and have impaired Congress's ability to control the governmental apparatus through public opinion.

42 421 U.S. 491 (1975). In *Eastland*, a congressional committee had subpoenaed the bank records of the United States Servicemen's Fund, an anti-war group. The Fund, hoping to preserve the anonymity of its contributors, sought an injunction barring implementation of the subpoena as a violation of the first amendment. *Id.* at 496. Because the subpoena was directed to a third party, the Fund could not test the validity of the subpoena in the traditional manner—a contempt proceeding following failure to comply. *Id.* at 498.

In practice, *Eastland* does not prevent injunctions against congressional action. *See, e.g.*, Doe v. McMillan, 412 U.S. 306 (1973) (applicants blocked dissemination of potentially damaging congressional report by obtaining injunction against Public Printer barring publication of the report).

43 421 U.S. at 503. The Court stated that "once it is determined that Members [of Congress] are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." *Id.* (citing Doe v. McMillan, 412 U.S. 306, 314 (1973)).

ers doctrine thus required an extension of immunity because the delay caused by judicial proceedings[44] threatened to interfere with Congress's exercise of its legitimate legislative powers.[45]

The Supreme Court held state legislators immune from damage claims brought under the Civil Rights Act[46] in *Tenney v. Brandhove*.[47] Basing its decision on historical data demonstrating a "tradition of legislative freedom . . . carefully preserved in the formation of State and National Governments,"[48] the Court ruled that "the statute . . . [did] not create civil liability for [legislative] conduct."[49] The Court recognized that having federal courts process these claims would unjustifiably threaten legislative independence.[50] The Court, however, limited its

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Eastland indicates that under the second tier of immunity analysis, *see* note 15 and accompanying text *supra*, the separation of powers doctrine will not tolerate judicial interference with congressional activity.

44 The Court appeared particularly concerned with the time required to obtain judicial review. In *Eastland*, nearly five years had passed between the issuance of the committee's subpoena and the Supreme Court's ruling upholding its enforceability. 421 U.S. at 511.

45 Justice Marshall, joined by Justices Brennan and Stewart, concurred separately to restate his view that the Speech or Debate Clause "does not immunize congressional action from judicial review." 421 U.S. at 513. He noted that "[t]his case does not present the questions of what would be the proper procedure . . . in an effort to get before a court a constitutional challenge to a subpoena *duces tecum* issued to a third party." *Id.* at 517. Justice Douglas dissented, arguing that the Speech or Debate Clause does not apply to activities that violate first amendment rights. *Id.* at 518.

46 42 U.S.C. § 1983 (1976). The Act provides: "Every person who, under color of [law] . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable . . . in an action at law, suit in equity, or other proper proceeding for redress." The Supreme Court permitted a similar cause of action for damages against federal officers for fourth amendment violations in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). The Court appears ready to extend the scope of *Bivens* to other constitutional violations by federal officers. *See* Carlson v. Green, 446 U.S. 14 (1980) (private right of action found for eighth amendment violation); Butz v. Economou, 438 U.S. 478, 486 (1978) ("*Bivens* established that compensable injury to a constitutionally protected interest could be vindicated by a suit for damages . . . ."). *See generally* P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, *supra* note 26, at 108-09 (4th ed. Supp. 1980); HART & WECHSLER, *supra* note 20, at 176-92 (Supp. 1981).

47 341 U.S. 367 (1951). Brandhove sued a state legislative committee and its members, claiming damages caused by its investigation of his activities.

48 *Id.* at 376. For a discussion of the historical data, most notably the seventeenth century struggle between the English King and Parliament, see Reinstein & Silverglate, *supra* note 37, at 1122-35.

49 341 U.S. at 379. In his opinion for the Court, Justice Frankfurter did not indicate whether his resolution of the case depended on a separation of powers or a federalism analysis. At that time, considerable uncertainty existed regarding the applicability of separation of powers analysis to federal court review of state action. The Court resolved the issue 11 years later in Baker v. Carr, 369 U.S. 186 (1962), holding that the separation of powers doctrine does not bar federal court review of state action. *See* notes 21-23 and accompanying text *supra*. Justice Frankfurter dissented in *Baker*, arguing that separation of powers analysis does present such a bar. Baker v. Carr, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting).

50 The Court stated that "[c]ourts are not the place for such controversies." 341 U.S. at 378. It referred to other, more appropriate, checks on legislative abuses, declaring that "[s]elf-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." *Id.*

holding to state legislators' liability for damages under the Civil Rights Act;[51] its ruling did not extend to claims of legislative immunity raised in other contexts.[52]

The Supreme Court has yet to decide whether legislative immunity bars federal courts from issuing injunctions against state legislators.[53] Dicta from some opinions suggest that the Court recognizes a similarity between the immunity of state legislators and the immunity accorded members of Congress.[54] If these dicta indicate that the Court equates the scope of state and federal legislative immunity, a second-tier issue,[55] then *Eastland*'s grant of immunity from injunctive relief to members of Congress requires a similar grant to state legislators. These dicta may, however, reflect only a recognition that similar problems of interference with legislative activity attach both to federal court actions against state legislators and to federal court actions against members of Congress—a first-tier issue.[56] This first-tier similarity does not require an extension of Congress's absolute immunity from federal court injunctions to state leg-

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51 "We conclude only . . . that the statute of 1871 does not create civil liability for such conduct." *Id.* at 379. The Court, however, questioned whether Congress has the constitutional power to abrogate legislative immunity. *Id.* at 376.

52 Although the Court limited its holding to liability for damages under the Civil Rights Act, *see id.* at 376, 379, its reasoning suggests a broad view of the scope of state legislative immunity in this context. The Court referred to legislative immunity as a right of the community, not a personal right belonging to legislators. *Id.* at 377. *See* Coffin v. Coffin, 4 Mass. 1, 27 (1808) ("[T]hese privileges are thus secured, not with the intention of protecting the members . . . , but to support the rights of the people . . . ."). Under this reasoning, the imposition of liability distracts legislators from the performance of their public duties and thus interferes with the community's interest in effective government. *See* 341 U.S. at 377. Any judicial proceeding represents a distraction to legislators, *see* note 18 *supra*, and, under the Court's reasoning, would seem to require an extension of immunity. The Court, however, has indicated that it might not apply this analysis to other judicial proceedings against legislators. " 'It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible.' " 341 U.S. at 378-79 (quoting Kilbourn v. Thompson, 103 U.S. 168, 204 (1880)). *See* United States v. Gillock, 445 U.S. 360, 372 (1980) (holding state legislators subject to federal criminal prosecutions and arguing that *Tenney* "presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials").

53 One commentator has interpreted the Court's silence as a recognition of the susceptibility of state legislators to a federal court's equitable jurisdiction. *See* Weinberg, *supra* note 13, at 1232-33.

54 The Court has used language from federal and state legislative immunity cases interchangeably. *See, e.g.,* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502-06 (1975); Dombrowski v. Eastland, 387 U.S. 82, 84-85 (1967); United States v. Johnson, 383 U.S. 169, 180 (1966); Tenney v. Brandhove, 341 U.S. 367, 377-79 (1951). The Court does not indicate that it equates the two types of immunity; it merely finds a similarity of interests involved in the two, particularly with regard to issues involving first-tier analysis. This potentially misleading use of precedent may result from the relative scarcity of legislative immunity cases decided by the Court.

55 Given the different constitutional bases for state and federal legislative immunity, *see* notes 20-26 and accompanying text *supra*, this result seems improper.

56 Similar concerns affect the immunity of members of Congress and state legislators under first-tier analysis. *See* notes 16-19 and accompanying text *supra*.

islators because second-tier analysis recognizes different levels of justifiable interference under separation of powers and federalism analyses.[57]

In *United States v. Gillock*,[58] the Supreme Court refused to recognize a state legislator's claim of legislative immunity in a federal criminal prosecution, thus suggesting a distinction between the scope of federal and state legislative immunity.[59] The Court, rejecting the defendant legislator's request to suppress evidence of his legislative acts under the Speech or Debate Clause, declared that the Clause is limited "by its terms . . . to federal legislators."[60] The Court concluded that separation of powers, the policy underlying the Speech or Debate Clause, is irrelevant in a federal prosecution of a state legislator.[61] Noting that federalism imposes a less stringent restraint on federal court action than does the separation of powers doctrine,[62] the Court held that "where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields."[63] The Court stated that federalism bars federal court action only where judicial review "result[s] in a direct federal impact on traditional state governmental functions."[64]

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57 *See* notes 20-26 and accompanying text *supra*.

58 445 U.S. 360 (1980).

59 Gillock, a Tennessee state senator, was indicted on seven counts of violating federal criminal statutes. At trial, the federal district court granted Gillock's motion to suppress evidence related to his legislative acts, and the government appealed. The Court acknowledged that the evidentiary privilege granted members of Congress under the Speech or Debate Clause would compel exclusion of similar evidence in a prosecution of a congressman, 445 U.S. at 366-67, but ruled that the evidence was admissible in a prosecution of a state legislator.

60 *Id.* at 374.

61 *Id.* at 369-70. The central purpose of the Speech or Debate Clause is " 'to preserve the constitutional structure of separate, coequal, and independent branches of government.' " *Id.* at 369 (quoting United States v. Helstoski, 442 U.S. 477, 491 (1979)). State governmental bodies do not qualify as "separate, coequal, and independent branches of government." Baker v. Carr, 369 U.S. 186 (1962). Therefore, "the separation-of-powers doctrine [ ] gives no support to the grant of a privilege to state legislators in federal criminal prosecutions." 445 U.S. at 370.

62 "[F]ederal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch." 445 U.S. at 370 (citing Baker v. Carr, 369 U.S. 186, 210 (1962)). "[T]he Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power." 445 U.S. at 370. The Court noted the limited scope of federal power, *id.*, but held that where the federal government has properly exercised its power, state legislative immunity does not bar the federal action. *Id.* at 370-74.

63 *Id.* at 373. The Court distinguished Tenney v. Brandhove, 341 U.S. 367 (1951), *see* notes 46-52 and accompanying text *supra*, as applying only to civil actions brought in federal courts. The Court reasoned that *Tenney* implicitly recognized federal criminal prosecutions as a check on legislative misconduct. 445 U.S. at 372-73.

64 445 U.S. at 371 (citing National Leagne of Cities v. Usery, 426 U.S. 833 (1976)). In *National League of Cities*, the Court held that the application of the federal minimum wage law to state employees would interfere with the states' sovereign powers. Under principles of federalism, federal control of state activity is acceptable where the Constitution grants the federal government authority to act. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-2 (1978). *National League of Cities* acts as a limitation on the federal government's

The circuit courts have divided on the question whether federalism bars federal courts from issuing injunctions against state legislators.[65] In *Jordan v. Hutcheson*,[66] the Fourth Circuit held that the district court had jurisdiction to issue an injunction against a state legislative committee alleged to have used its investigative powers to harass civil rights activists.[67] The court stated that "[a]lthough the federal courts will recognize and respect the [state] . . . legislature['s] broad investigatory powers, nevertheless these powers are not unlimited and it remains the duty of the federal courts to protect the individual's constitutional rights."[68] If the plaintiff demonstrates a "clear possibility of an immediate and irreparable injury to [his constitutionally protected] rights," the federal court can issue the injunction.[69]

The Second Circuit reached a contrary conclusion in *Star Distribu-*

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constitutional authority by preventing the federal government from acting "directly [to] displace the States' freedom to structure integral operations in areas of traditional governmental functions . . . ." 426 U.S. at 852. *Cf.* Younger v. Harris, 401 U.S. 37 (1971) and notes 31-33 and accompanying text *supra* (principles of federalism generally bar federal courts from issuing injunctions against pending state criminal prosecutions).

Under *National League of Cities*, the federal government may not act in fields that implicate traditional state governmental functions and which constitute a direct displacement of state authority. In *National League of Cities*, the federal minimum wage constrained the state's ability to allocate resources according to its own policies—a traditional state goverumental function. In like manner, liability of state legislators may allow a federal court to impose constraints upon officials' actions and thereby interfere with traditional state goverumental functions. The Supreme Court, however, distinguished *Gillock* from *National League of Cities* because of the directness of the federal regulation in *Gillock*. 445 U.S. at 371. The Court stated that although the threat of personal liability "might conceivably influence [a state legislator's] conduct while in the legislature, it is not in any sense analogous to the direct regulation imposed by the federal wage-fixing legislation in *National League of Cities*." *Id.*

65 The Second, Fifth, and Eighth Circuits have granted state legislators immunity from injunctive suits. *See* Star Distribs., Ltd. v. Marino, 613 F.2d 4 (2d Cir. 1980); Smith v. Klecker, 554 F.2d 848 (8th Cir. 1977); Safety Harbor v. Birchfield, 529 F.2d 1251 (5th Cir. 1976). The Fourth Circuit has denied state legislators immunity from injunctions. *See* Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963). The *Star Distributors* and *Jordan* opinions provide the most complete discussions of the competing interests in these cases.

66 323 F.2d 597 (4th Cir. 1963).

67 Plaintiff attorneys represented various clients seeking desegregation of Virginia schools. To frustrate the plaintiffs' activities, the Virginia legislature passed a statute in 1956 redefining the offenses of champerty and barratry. The legislature also created a committee to investigate the enforcement of these new laws. In 1958, the underlying statute was ruled constitutional, NAACP v. Patty, 159 F. Supp. 503 (E.D. Va. 1958), *vacated*, Harrison v. NAACP, 360 U.S. 167 (1959), and the legislature enacted a revised version of the statute. 323 F.2d at 599-603.

68 323 F.2d at 601. The court noted that federalism does not shield "the activities of the executive and judicial branches of the state from interdiction when constitutional rights are involved." *Id.* (citing Bell v. Hood, 327 U.S. 678 (1946)).

69 323 F.2d at 601; *cf.* note 32 and accompanying text *supra* (outlining the requirements for an injunction under *Younger*). *Younger* set similar standards for the interposition of federal court injunctive relief in state criminal proceedings. *Younger*, however, requires a plaintiff to make a somewhat greater showing of threatened injury and also looks to the adequacy of alternative state remedial procedures. *See* note 31 *supra*.

tors, Ltd. v. Marino[70] and refused to enjoin a state legislative committee's investigation of child pornography.[71] Noting the similar concerns underlying the immunity of federal and state legislators[72] and the distinction between the requirements of separation of powers and federalism,[73] the court declared that "[w]e show no more than 'a proper respect for state functions' . . . in holding that state legislators must be accorded a privilege similar to that of federal legislators."[74]

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70 613 F.2d 4 (2d Cir. 1980).

71 Several factual differences distinguish *Jordan* from *Star Distributors*, making the latter less amenable to federal court action. First, the plaintiffs in *Jordan* alleged a continuing campaign of harassment by the legislature, 323 F.2d at 599, while the plaintiffs in *Star Distributors* challenged a single act of the legislature. 613 F.2d at 5-6. Second, the underlying statute in *Jordan* resembled special legislation directed at the plaintiffs, 323 F.2d at 602-03, while the statute in *Star Distributors* was of more general application. 613 F.2d at 5. The *Star Distributors* legislature's interest in controlling child pornography and organized crime, 613 F.2d at 5, arguably represented a more substantial state function than the *Jordan* legislature's interest in controlling champerty and barratry. 323 F.2d at 602-03. Finally, in *Jordan*, the presence of third party victims of the legislature's investigation, 323 F.2d at 604, prevented the plaintiffs from protecting their rights through disobedience—an option available to Star Distributors. 613 F.2d at 6.

72 The court stated that members of Congress are immune from injunctive suits because the burdens of defending such suits would threaten to interfere with legislative activities. 613 F.2d at 7. This reasoning applies only to first-tier analysis of the immunity claim—measurement of the level of interference; it does not apply necessarily to second-tier analysis. *See generally* notes 13-14 and accompanying text *supra*.

73 613 F.2d at 9. The court, however, did not explain what significance, if any, it attached to this distinction.

74 *Id.* (quoting Younger v. Harris, 401 U.S. 37, 44 (1971) (citation omitted)). The court further supported its decision to grant immunity by stating that " '[t]o create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.' " *Id.* (quoting Butz v. Economou, 438 U.S. 478, 504 (1978)).

The court's application of Butz's reasoning to a case involving state legislative immunity appears inappropriate. The Bill of Rights is concerned primarily with substantive protections for individual rights. In this area, the Constitution imposes greater limitations on the federal government than it does on state governments. *See* L. TRIBE, *supra* note 64, § 11-12.

The *Star Distributors* and *Butz* courts, however, were concerned primarily with remedies for constitutional violations. In this area, the Supreme Court has recognized a presumption in favor of redressing constitutional violations. *See* note 11 *supra*. Given this presumption, the identity of the offending official should make little difference; complete redress should be the general rule. The development of the *Bivens* implied right of action for constitutional violations by federal executive officials is evidence of the weight of the presumption. *See generally* note 11 *supra*.

Other factors may intervene to rebut this presumption. Members of Congress, for example, are specifically exempted from immunity by the constitutional language of the Speech or Debate Clause. This textual limitation upon congressional liability creates a problem in equating the liability of federal and state legislators in the way that *Butz* equated the liability of federal and state executive officials. Equating the liability of federal and state legislators would require a limitation of the liability of state legislators for constitutional violations. Although such a limitation would alleviate the imbalance between the liability of state and federal officials, it would contravene the presumption of providing redress for constitutional violations, an impermissible result under the fourteenth amendment. *See* note 11-13 and accompanying text *supra*.

In light of these considerations, *Butz*'s policy of granting state officials equal or greater

In sum, the Speech or Debate Clause and the doctrine of separation of powers provide members of Congress with virtually absolute immunity from suits for damages and injunctive relief arising out of their official conduct. Concerns of federalism provide state legislators with similar immunity from suits for damages, but it remains an open question whether they are immune from suits for injunctive relief. Supreme Court dicta and decisions in related fields, along with lower court opinions, provide conflicting views on the ultimate resolution of this issue.

2. *Judicial Immunity*

Virtually absolute immunity protects state[75] court judges from damage claims. In *Bradley v. Fisher*,[76] the Supreme Court upheld a directed verdict based on the defendant judge's immunity in a suit for damages.[77] Citing an old common law tradition of judicial immunity,[78] the Court emphasized the potential damage to the independence of judicial proceedings that liability might occasion.[79] Two Justices dissented, arguing that judges should be liable for their malicious and corrupt acts.[80] The majority suggested that the availability of alternative checks upon judicial misconduct[81] removed the need to hold judges

immunity than federal officials must be qualified to guarantee a remedy for constitutional violations. Maintaining a balance between state and federal liability may remain a subsidiary goal—one that is subject to the explicit language of the Constitution. In the case of legislative immunity, the Speech or Debate Clause requires a compromise of this goal. Therefore, the policy of *Butz*, though generally correct and laudable, should not apply to a case involving state legislative immunity.

75 This Note does not discuss the immunity of federal judges, because it appears that there are no reported decisions to date discussing the applicability of the judicial immunity doctrine to federal court judges.

76 80 U.S. (13 Wall.) 335 (1871). The Court decided *Bradley* several months before the passage of the 1871 Civil Rights Act.

77 80 U.S. (13 Wall.) at 340-41. Plaintiff attorney sued for damages after the defendant judge had removed him from the roll of attorneys because of his misconduct during the defense of a man charged with murdering Abraham Lincoln. *Id.* at 344.

78 The Court cited a list of English and American authorities, including Justice Mayne, Chancellor Kent, Chief Justice Coke, and Chief Justice Shaw. *Id.* at 347-49.

79 "Liability . . . would destroy that independence without which no judiciary can be either respectable or useful." *Id.* at 347. *See generally* note 34 *supra*. A cynic might attribute the Justices' extraordinary sensitivity to the requirements of adjudication to their personal interest in maintaining judicial immunity.

80 80 U.S. (13 Wall.) at 357. However appealing as a deterrent to judicial misconduct, this standard would pose serious practical problems. Guiltless judges charged with malicious and corrupt conduct would be required to face a trial on the merits. Early dismissal of groundless claims would be unlikely because of courts' inclination not to determine issues involving an element of intent without a trial on the merits. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 99, at 493 (3d ed. 1976). The defense of these lawsuits would substantially interfere with the duties of the judiciary. In contrast, the majority's standard would rarely require a trial on the merits. Because immunity attaches to any exercise of judicial authority, the only inquiry will be whether the judge has performed a judicial act. This inquiry does not involve a question of intent and may be completed without extensive consideration of the facts of the case.

81 *E.g.*, impeachment. 80 U.S. (13 Wall.) at 350.

liable for damages. Later, commentators developed this argument by referring to the procedural safeguards of appellate review as a means of protecting against judicial misconduct.[82] The Court's recent decision in *Stump v. Sparkman*,[83] however, ignored the alternative remedy argnment[84] by sanctioning immunity in cases in which no effective appellate review is available.[85]

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82 *See* Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44, 53-56 (1960); Note, *Federal Executive Immunity From Civil Liability in Damages: A Reevaluation of* Barr v. Matteo, 77 COLUM. L. REV. 625, 647 (1977).

83 435 U.S. 349 (1978) (state court judge immune from claim for damages arising out of his sterilization order of a slightly retarded woman in a proceeding laden with gross procedural defects).

84 Three Justices dissented, arguing that the presence of gross procedural errors dissolved the judge's immunity. The judge's order came in an informal ex parte hearing in which the woman was not represented by counsel or given notice of the procceding. These procedural irregularities foreclosed the opportunity for appellate review to correct the judge's errors. *Id.* at 369-70 (Powell, J., dissenting).

The majority, iguoring this problem, set out a two-part test for granting judicial immunity: (1) the judge must perform a judicial act; and (2) the judge must not be acting in the clear absence of jurisdiction. The majority statcd that

> the factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, *i.e.,* whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.,* whether they dealt with the judge in his judicial eapacity.

Id. at 362. The majority relied on *Bradley v. Fisher* for its explanation of "clear absence of jurisdiction":

> A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisidiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case . . . .

435 U.S. at 356 n.6 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351-52 (1871)).

The Court noted a line of cases in which the circuit courts have held state court judges liable beeause their acts were not part of the judicial function. 435 U.S. at 361 n.10. Recently, two circuits have used *Stump*'s judicial act requirement to deny immunity to state court judges. *See* Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 2020 (1981) (prior agreement to rule favorably on guardianship petition not a protected judicial act); Vanderwater v. Lopez, 620 F.2d 1229 (7th Cir.), *cert. dismissed*, 449 U.S. 1028 (1980) (participation in prosecution not a protected judicial act).

Stump has generated much criticism. *See, e.g.,* Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 DUKE L.J. 879; Nagel, *supra* note 10; Rosenberg, Stump v. Sparkman: *The Doctrine of Judicial Impunity*, 64 VA. L. REV. 833 (1978).

85 *Stump* does not recognize a constitutional requirement of absolute immunity for state court judges. The plaintiffs in *Stump* had two available approaches. They might have argued for a shift in the extent of the immunity from the absolute protection of Pierson v. Ray, 386 U.S. 547 (1967), to the qualified view of Scheuer v. Rhodes, 416 U.S. 232 (1974). Instead, the parties litigated the case as a possible limitation on the "judicial act" that underlies the extension of immunity. Both sides implicitly agreed that absolute immunity follows from the underlying judicial act.

The relatively recent decision in *Pierson* probably deterred the *Stump* plaintiffs from challenging the standard of absolute immunity. They might, however, have challenged *Pierson* by

The susceptibility of state judges to injunctive suits is less clear. The Supreme Court has not directly addressed the issue.[86] Dicta in *O'Shea v. Littleton*,[87] in which the Court denied an injunction against a state court, suggest that judicial immunity would not protect against "otherwise criminal deprivations of constitutional rights."[88] This indicates that, at least in the area of criminal prosecutions for civil rights violations, the Court does not view judicial immunity from injunction as absolute. Future decisions must develop the scope of this exception. Several circuits already have allowed actions for injunctive relief against state court judges.[89]

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referring to the subsequent development of the doctrine of qualified immunity. The Court might have followed the approach it took in *Scheuer*, viewing qualified immunity as a refinement of this branch of official immunity. Instead, the Court assumed that absolute immunity followed the judicial act.

The *Stump* decision probably forecloses this means of modifying judicial immunity. At its very least, *Stump* indieates that under the common law view, absolute immunity still exists. This does not mean, however, that Congress eannot pass a statute limiting state court judges to qualified immunity from damage suits. Such a statute would overturn the common law basis for absolute immunity relied upon in *Pierson* and *Stump* and remove any statutory ambiguity in favor of imposing liability.

The question remains whether this statute would pass constitutional muster. Arguably, the possibility of liability would represent an unconstitutional threat to the independence of the state judiciary. Most of the concerns involved in first-tier analysis, *see* notes 16-19 and accompanying text *supra*, apply with similar force to the defense of any action, regardless of the presence of a qualified immunity. Only absolute immunity will remove the burdens imposed by liability.

The second-tier question whether these burdens are permissible remains. The need to provide redress for constitutional violations, *see* note 13 *supra*, militates in favor of the imposition of liability. In the analogous field of executive immunity, the Court held a state governor entitled to only a qualified immunity. *See* Scheuer v. Rhodes, 416 U.S. 232 (1974). Federal authority over state court judges presents a lesser threat to the state's sovereignty than does similar authority over the state's highest official—its governor. Still, a court could point to the judiciary's particular susceptibility to undue influence to justify requiring absolute immunity. *See* note 34 *supra*.

In the final analysis, the determination of whether such a statute violates the Constitution requires the Court to make a judgment eall. Would imposition of liability under § 1983, limited by a qualifled immunity, present a sufficient threat to judicial independence to compromise the integrity of the state's judiciary and require a determination that the statute is unconstitutional? Given all of the factors discussed above, such a statute should pass constitutional muster.

86 In *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, the Court distinguished a number of its own precedents to reach the conclusion that "we have not addressed the question." 446 U.S. at 735.

87 414 U.S. 488 (1974). The Court disposed of the ease on the ground that the plaintiffs had failed to demonstrate the presence of a ease or controversy. *Id.* at 493-99. The Court cited *Younger* as an alternative justification for its result. *Id.* at 499.

88 *Id.* at 503. The Court stated: "[W]e have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights." *Id.*

89 *See, e.g.,* Heimbach v. Village of Lyons, 597 F.2d 344 (2d Cir. 1979); Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975); Shipp v. Todd, 568 F.2d 133 (9th Cir. 1978). These eases offer little insight into the factors bchind the courts' refusal to grant judicial immunity from injunctive actions. The cases generally distinguish *Bradley* and *Stump* as barring claims

3. *Executive Immunity*

Conflicting concerns of federalism and protection of federally guaranteed rights contributed to the development, in *Scheuer v. Rhodes*,[90] of a qualified immunity[91] from damage suits[92] for state executive officials. Although the *Scheuer* Court recognized the disruptive effect of judicial proceedings on a state's executive functions,[93] it concluded that "government officials, as a class, could not be totally exempt . . . from liability under [the terms of section 1983]."[94] The Court found that federal courts must retain the power to review the acts of state executive officials.[95] Otherwise,

> the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; . . . the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity.[96]

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for damages only and hold that judicial immunity does not bar claims for injunctive relief. The opinions, however, do not offer any rationale for this distinction.

90 416 U.S. 232 (1974). The claim in *Scheuer* arose out of the deaths of three students during the 1970 anti-war disturbance at Kent State University. Parents of the victims brought suit for damages against the Governor of Ohio and other high-ranking executive officials, charging violations of the students' constitutional rights. The Court rejected the defendant officials' claim of absolute immunity, remanding the case for a determination of liability under a qualified immunity standard.

91 The term "immunity" is something of a misnomer in these cases. Unlike absolute immunity, qualified immunity does not act as a bar to federal court jurisdiction. Rather, it acts as an affirmative defense for the defendant. The defense depends heavily on the propriety of the official's conduct. As a result, the defendant usually has to defend a trial on the merits. *See* Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976); note 97 and accompanying text *infra*.

92 Federal courts may issue injunctions against state executive officials to prohibit unconstitutional conduct. *See Ex parte* Young, 209 U.S. 123 (1908). *See generally* L. TRIBE, *supra* note 64, § 3-38.

93 416 U.S. at 239-41. The Court stated:

> [O]fficial immunity apparently rested, in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligation of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Id. at 240 (footnote omitted). *See generally* notes 16-17 and accompanying text *supra*.

94 416 U.S. at 243.

95 *Id.* at 248. The Court emphasized the constitutional limitations upon state conduct:

> [W]hen a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character . . . . The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

Id. at 237 (quoting *Ex parte* Young, 209 U.S. 123, 159-60 (1908)).

96 416 U.S. at 248 (quoting Sterling v. Constantin, 287 U.S. 378, 397 (1932)). Executive

Still, fears of disrupting state activities led the Court to grant a varying degree of immunity to individual executive officers, depending on the reasonableness of their actions and the scope of their discretionary powers.[97]

A similar qualified immunity shields federal executive officials from damage suits.[98] Cabinet level officials received absolute immunity in common law tort claims because "[i]t would seriously cripple the . . . administration of . . . the executive branch of the government if [they] were subjected to [such damage claims]."[99] The Supreme Court later extended this immunity to other executive officers in view of the potential disruptive effect of liability on executive action.[100] The Court, however, recently distinguished these decisions in ruling that immunity does not shield executive officials charged with violations of constitutional rights.[101] The judicial duty to protect constitutional rights prohibits a

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action falls into two major categories: ministerial acts and discretionary aets. *See* 28 U.S.C. § 2680(a) (1976) (crcating distinction between discretionary and other governmental functions). Ministerial acts involve the implementation of specific statutes and regulations and only a limited amount of discretionary judgment. By reference to statutory law, the public may prediet accurately the executive's ministerial actions. Thus, a victim threatened by possible executive implementation of a statute is able to seek prospective relief. In contrast, the executive's discretionary acts, such as instigation of a criminal investigation, involve the exercise of considerable independent judgment. In this area, the public generally cannot predict the executive's aetions. This uncertainty makes prospective relief for official misconduct impossible. Liability in damages is necessary to provide some redress from official misconduct. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcoties, 403 U.S. 388, 409-10 (1971) (Harlan, J., concurring). *See generally* Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 218-25 (1963).

97 The extent of the immunity depends on the official action involved. In *Scheuer*, the Court stated that

> the variation [is] dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on whieh liability is sought to be based. It is the existence of reasonable grounds for the belief [in the validity of the action] formed at the time and in light of all the circumstances, coupled with the good-faith belief, that affords a basis for qualified immunity . . . .

416 U.S. at 247-48. In Wood v. Strickland, 420 U.S. 308, 321 (1975), the Court refined this formulation to require officials to meet both a subjective and objective test of good faith. The subjective portion of this test requires an official to act "with a belief that he is doing right . . . ." *Id.* In *Wood*, however, the Court held that the defendant sehool board members did not act reasonably, and therefore failed to satisfy the objective portion of the good faith test when they acted with "disregard of the student's clearly established constitutional rights." *Id.* at 322.

98 See Butz v. Economou, 438 U.S. 478 (1978), in which the Court stated: "[W]e deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Id.* at 504. Federal executive officers are subject to suits for injunctions.

99 Spalding v. Vilas, 161 U.S. 483, 498 (1896). In Spalding, the plaintiff brought a defamation claim seeking damages from the Postmaster General for the Postmaster General's alleged malicious actions against the plaintiff.

100 Barr v. Matteo, 360 U.S. 564 (1959) (Acting Director of the Office of Rent Stabilization absolutely immune from libel claim arising out of official conduct).

101 Butz v. Economou, 438 U.S. 478 (1978). The Butz Court drew a distinction between

grant of immunity for unconstitutional executive action.[102] Still, preservation of the executive's position in the constitutional structure continues to require a qualified immunity similar to that accorded state officials.[103]

4. *Functional Approach*

The Court's emphasis on preventing disruption of governmental activities led to the extension of official immunity to situations beyond the scope of traditional legislative, judicial, and executive immunity.[104] As one commentator has noted, it is "not the dignity of high political office, but the nature of the functions exercised [that] is the touchstone of the . . . privilege."[105] This attitude prompted the Court to adopt a functional approach to immunity in *Butz v. Economou*.[106] Citing the general rule that executive officials have only a qualified immunity,[107] the Court examined the defendant officials' duties to determine whether their performance required a broader grant of immunity. The Court found that the defendants' duties were " 'functionally comparable' to [those] of a judge."[108] Noting that "[j]udges have absolute immunity . . . because of the special nature of their responsibilities,"[109] the Court granted the same absolute immunity to the defendant executive officials.[110]

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claims based on common law violations and claims based on violations of constitutional rights. *Id.* at 495. In practice, this distinction contains little substance. Common law claims "may be readily converted by any legal neophyte into a claim of denial of procedural due process under the Fifth Amendment." *Id.* at 522 (Rehnquist, J., dissenting). See Note, *Qualified Immunity for Executive Officials for Constitutional Violations:* Butz v. Economou, 20 B.C. L. REV. 575, 597-98 (1979); Note, *Governmental Immunity—Civil Rights—Constitutional Law—Scope of Immunity Available to Federal Executive Officials*, 1979 WIS. L. REV. 604, 619-20. Litigants confronted with this situation may choose to present their claims as constitutional rather than common law violations, thereby avoiding the greater immunity provided by *Barr* and *Spalding*.

102 438 U.S. at 489-91. The Court noted that "extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees." *Id.* at 505.

103 For a discussion of qualified immunity, see notes 13 & 97 and accompanying text *supra*.

104 *See, e.g.,* Butz v. Economou, 438 U.S. 478, 511-12 (1978); Scheuer v. Rhodes, 416 U.S. 232, 241-42 (1974); Barr v. Matteo, 360 U.S. 564, 571-73 (1959).

105 Note, *The Scope of Immunity for Legislators and Their Employees*, 77 YALE L.J. 366, 384 (1967).

106 438 U.S. 478 (1978). The latter portion of the opinion addresses specifically the immunity of agency attorneys and hearings officers involved in administrative law proceedings. The Court found that the functions of these executive officials are analogous to those of prosecutors and judges in court proceedings. *Id.* at 508-16.

107 *See* notes 101-03 and accompanying text *supra*.

108 438 U.S. at 513.

109 *Id.* at 511.

110 Manifesting its intention to retain the general rule of liability, the Court held that "officials who seek absolute exemption from personal liability for unconstitutional conduct

II

SUPREME COURT OF VIRGINIA V. CONSUMERS UNION OF THE UNITED STATES, INC.

Acting under the authority of a state enabling statute[111] and its own inherent power to regulate and discipline attorneys,[112] the Supreme Court of Virginia (Virginia Court) promulgated the Virginia Code of Professional Responsibility.[113] Enforcement power lay in the State Bar

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must bear the burden of showing that public policy requires an exemption of that scope." *Id.* at 506.

In Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), the Court applied a functional approach to grant absolute immunity from damage claims to a quasi-legislative state agency responsible for regional development. Lake Country Estates landowners sought damages from the defendant planning agency claiming that TRPA's promulgation of a land use plan had diminished the value of their property in violation of the fifth and fourteenth amendments. TRPA was a multi-state appointive body responsible for overseeing regional development. The Court rejected TRPA's claims of sovereign immunity, *id.* at 400-02, but applied a functional approach to grant the individual defendants absolute legislative immunity from damages. *Id.* at 402-06.

Three Justices dissented in *Lake Country Estates*, criticizing the majority's use of the functional approach. The dissenters did not address the characterization of the land use plan as a legislative act, but focused their concerns on the institutional differences between TRPA and a state legislature. None of the members of TRPA was subject to the electorate. Further, TRPA had no internal procedures for disciplining its members. *See id.* at 406-08 (Marshall, J., dissenting); *id.* at 408-09 (Blackmun, J., dissenting). Given these institutional differences, the dissenters refused to accept the majority's analogy between TRPA and a state legislature as an appropriate basis for immunity.

The dissent prompts consideration of the validity of the functional approach. First-tier analysis of the threat of interference posed by judicial review depends on the nature of the official's activities and the official's responsibility to the electorate. The absence of elections increases the risk that the threat of liability will influence the official's actions, making TRPA a better candidate for immunity than a legislature. Institutional differences play a more substantial role in determining the second-tier issue of permissible interference. *See* notes 20-26 and accompanying text *supra*. First, limitation upon the conduct of a quasi-legislative body's functions does not pose as great a threat to state sovereignty as does a limitation upon the conduct of the state legislature. Second, interference with an appointive body does not interfere with state citizens' ability to elect their own representatives—an important element of sovereignty. Given these considerations, extension of immunity based solely on a comparison of functions is improper because of its failure to consider many elements necessary for proper immunity analysis.

111 VA. CODE § 54-48 (1950) provides:

> The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:
>
> (a) Defining the practice of law.
>
> (a1) Prescribing procedure for limited practice of law by third-year law students.
>
> (b) Prescribing a code of ethics governing the professional conduct of attorneys-at-law. . . .
>
> (c) Prescribing procedure for disciplining, suspending, and disbarring attorneys-at-law.

112 *See* Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719, 721 (1980). *See also* Button v. Day, 204 Va. 547, 132 S.E.2d 292 (1963).

113 446 U.S. at 721-22. The Virginia Code did not differ in any relevant respect from the American Bar Association's Code of Professional Responsibility.

and in the Virginia Court.[114] After the United States Supreme Court declared unconstitutional the provisions of the American Bar Association Code of Professional Responsibility limiting attorney advertising,[115] the Virginia Court failed to modify its similar regulations.[116] Consumers Union sought a permanent injunction in federal district court to enjoin enforcement of the regulations.[117] The district court issued the injunction[118] and found the Virginia Court liable for attorneys' fees because of its failure to modify the challenged regulations.[119] The Virginia Court appealed the fees award, claiming absolute judicial immunity for its regulatory actions.[120]

The Supreme Court vacated the fees award, holding that legislative immunity barred a federal court from imposing liability based on the Virginia Court's legislative conduct.[121] The Court's analysis followed

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114 *See* VA. CODE § 54-74 (1950).

115 Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (enforcement of ban on attorney advertising of fees violated first and fourteenth amendment rights of attorneys).

116 The Virginia Court refused to amend the regulations, even upon the request of the state bar. *See* 446 U.S. at 726. More than 20 months passed between the *Bates* decision and the district court injunction barring enforcement of the regulations. *See* Consumers Union of the United States v. American Bar Ass'n, 470 F. Supp. 1055, 1063 (E.D. Va. 1979), *rev'd sub nom.* Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719 (1980).

117 In 1974, Consumers Union sought to elicit information regarding fees and services from attorneys in order to publish a legal services directory. Recoguizing the effect that the Virginia Code's prohibition on attorney advertising would have on its efforts, Consumers Union sought the injunction. 470 F. Supp. at 1057-58.

118 The district court's final order provided:

> 1. The publication described in plaintiff's complaint [the directory] . . . is declared valid and constitutionally protected;
>
> 2. The Virginia Code of Professional Responsibility Disciplinary Rule 2-102 (A) (6) is declared unconstitutional on its face;
>
> 3. The defendants . . . are permanently enjoined from enforcement of Virginia Code of Professional Responsibility Disciplinary Rule 2-102 (A) (6).

See 446 U.S. at 727 n.6.

119 Consumers Union sought $121,000 in attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976). Jurisdictional Statement for Appellant at 11, Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719 (1980). The district court did not award attorneys' fees against the state Bar, because the state Bar had "unsuccessfully sought to persuade the court to amend the Code." 446 U.S. at 728. The court did award attorneys' fees against the Virginia Court, stating that it "would hardly be unjust to order the Supreme Court of Virginia defendants to pay plaintiffs reasonable attorneys [*sic*] fees in light of their continued failure and apparent refusal to amend [the Code] to conform with constitutional requirements." 470 F. Supp at 1063. The attorneys' fees award focused on the Virginia Court's rulemaking activities, thereby raising the issue of legislative immunity.

120 "At issue is the liability of a court for a judicial act." Jurisdictional Statement at 7, *supra* note 119. The lone reference to legislative immunity appeared in Professor Kurland's amicus brief. Brief for amicus curiae, Conference of Chief Justices, at 17, Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719 (1980).

121 The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), provides the link between the fees award and the Court's discussion of official immunity. In relevant part, the Act provides: "[I]n any action or proceeding to enforce a provision of section . . . 1983 . . . [of this title] . . . the court, in its discretion, may allow the prevailing

two steps. First, the Court reasoned that absolute legislative immunity would have barred a suit for injunctive relief against the state legislature for refusing to amend the code.[122] Second, the Court reasoned that this immunity extends to state court judges acting in a legislative capacity.[123]

The Court's initial conclusion—that legislative immunity would bar a suit against a state legislator in similar circumstances—represents an extension of legislative immunity. Prior cases did not grant state legislators immunity from injunctive suits.[124] In support of its extension of immunity, the Court noted its concern with the effect of judicial review upon legislative independence[125] and cited cases that granted members

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party . . . a reasonable attorney's fee as part of the costs." Under the Act, the district court's fees award depended upon Consumers Union's ability to prevail under § 1983. The Supreme Court found that "the District Court's award of attorney's fees in this case was premised on acts or omissions for which [the Virginia Court] enjoyed absolute legislative immunity. This was error." 446 U.S. at 738. The Court implied that the Virginia Court would be liable for attorneys' fees under the Act for activities done in its enforcement capacity. *Id.* at 739. This interpretation has the practical effect of dividing Consumers Union's claim into two suits—one dealing with legislative activities, the other dealing with enforcement activities. Under the Court's view, the activities giving rise to § 1983 liability must match the activities giving rise to § 1988 liability.

122 446 U.S. at 733-34. "[T]here is little doubt that if the Virginia Legislature had enacted the State Bar Code and if suit had been brought against the legislature . . . for refusing to amend the Code . . . , the defendants in that suit could successfully have sought dismissal on the grounds of absolute legislative immunity." *Id.* (footnote omitted).

The Court's opinion on this point may be given a very narrow reading. The legislature's refusal to amend the Code would lie at the very heart of the legislature's functioning. Under this reading, in future cases, the Court could limit the scope of state legislative immunity to core-type functions. Such an interpretation ignores a number of contrary ideas developed previously. First, the *Consumers Union* Court did not specifieally distinguish legislative functions. Second, the Court drew solely upon precedents that do not recognize any distinctions among legislative functions. Most important, however, is the Court's treatment of the conflict between the circuits on the issue of legislative immunity from injunctions. *Id.* at 732 n.10. The Court indicated a clear preference for Star Distribs., Ltd. v. Marino, 613 F.2d 4 (2d Cir. 1980) (state legislative committee immune from action for injunctive and declaratory relief), as opposed to Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963) (legislative immunity no bar to suits for prospective relief against state officials). The Court suggested that *Jordan* is no longer viable precedent after Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975). 446 U.S. at 732 n.10.

These factors indicate that the Court will adopt an expansive interpretation of its holding in *Consumers Union* to find state legislators immune from suits for injunctive relief relating to all their legislative functions.

123 *Id.* at 734. Significantly, the Court suggested that state court judges could be assessed attorneys' fees in cases based on the judges' executive enforcement actions. *Id.* at 738-39. The Third Circuit acted upon this suggestion in Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980), holding that judicial immunity does not bar recovery of attorneys' fees from judicial officers engaged in executive actions.

124 *See* note 54 and accompanying text *supra*.

125 The Court emphasized the need to "preserve legislative independence." 446 U.S. at 731. This portion of the Court's opinion deals with first-tier analysis of the immunity claim. *See generally* note 14 and accompanying text *supra*.

of Congress immunity from both damage claims and injunctive suits.[126] The Court stated that generally it equates federal and state legislative immunity,[127] citing *Gillock* as an exception to the general rule.[128]

The Court applied this extension of legislative immunity to the Virginia Court. Rejecting Consumers Union's contrary contention,[129] the Court concluded that the Virginia Court had exercised more than an ordinary delegation of rulemaking authority; the Virginia Court had exercised the state's entire legislative power to regulate attorney conduct.[130] Moreover, the Virginia Court claimed the inherent power to regulate attorney conduct.[131] Significantly, the Court did not indicate the relative importance of these two factors in its resolution of the case,[132] leaving open the question whether either factor alone would require an extension of absolute legislative immunity to other government officials. If either factor independently supports an extension of immunity, the Court's decision will affect significantly the scope of executive and judicial immunity.[133] Alternatively, if both factors must exist to justify an extension of immunity, the decision will have a nominal effect.[134]

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126 446 U.S. at 731-32. For a discussion of these cases, see notes 42-45, 53-57 and accompanying text *supra*.

127 446 U.S. at 733. This portion of the Court's opinion deals with second-tier analysis of the immunity claim. *See generally* note 15 and accompanying text *supra*.

128 446 U.S. at 733. *See generally* notes 58-64 and accompanying text *supra*. The Court did not articulate the standard it would apply in the future to determine whether other exceptions might be appropriate or indicate the factors that it would consider in this determination.

129 Consumers Union argued that the Virginia Court should not receive absolute legislative immunity where it is "merely exercising a delegated power to make rules." 446 U.S. at 734.

130 The Court stated that "the Virginia Court is exercising the State's entire legislative power with respect to regulating the Bar, and its members are the State's legislators for the purpose of issuing the Bar Code." *Id.*

131 *Id.*; *see* note 112 and accompanying text *supra*.

132 This difficulty relates back to the Court's failure to identify the precise basis of the Virginia Court's authority to promulgate the Code. The Court noted both the Virginia Court's claim to inherent judicial authority to regulate attorney conduct and the legislative delegation of authority to the Virginia Court, but did not state which source of power justified the Virginia Court's promulgation of the Code or whether they acted as concurrent justifications. *See* 446 U.S. at 721; notes 111-12 and accompanying text *supra*.

133 Judges exercise inherent judicial authority in other, more significant, areas than the regulation of attorney conduct. If *Consumers Union* is read to suggest that the exercise of inherent judicial authority alone requires a grant of absolute immunity, it may imply an extension of immunity in this area. *See* notes 155-65 and accompanying text *infra*.

Executive officials often exercise substantial rulemaking authority. If the case is read to suggest that exercise of substantial rulemaking authority requires a grant of absolute immunity, it may imply an extension of immunity to these officials. *See* notes 166-69 and accompanying text *infra*.

134 The coincidence of inherent judicial authority to regulate a field and a substantial delegation of legislative power in the same field will be found rarely, if ever.

III

IMPLICATIONS OF *CONSUMERS UNION*

Because of the Supreme Court's failure to articulate clearly the standards it applied in *Consumers Union*, the decision is subject to a range of interpretations. Although the opinion could be read to recognize several significant extensions of official immunity, proper consideration of the constitutional basis of official immunity supports a more restrictive reading.

A. *State Legislative Immunity from Injunctive Suit*

In *Consumers Union*, the Supreme Court contended that state legislators are immune from injunctive suit. The Court properly relied on cases gauging the effect of judicial interference on both federal and state legislative activity—a first-tier issue.[135] The Court failed, however, to address sufficiently the second-tier issue in cases involving state legislators: whether this interference requires federal court abstention to preserve the interests of federalism.[136] Noting the difference between separation of powers and federalism,[137] the Court indicated that it was not equating federal and state legislative immunity. Nevertheless, it noted that federal and state legislators generally have been accorded the same scope of legislative immunity.[138] Thus, the Court declared, state legislators are immune from injunctive suits[139] and, therefore, so were

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135 446 U.S. at 731-33. Because federal and state legislators follow similar procedures, federal court review presents a similar threat of disruption to each. *See* note 14 and accompanying text *supra*.

136 On this tier, the standards applieable to interference with federal and state legislative activity differ beeause of the difference between the requirements of federalism and separation of powers doctrine. The Court determined the effect of separation of powers doctrine upon federal courts' power to enjoin members of Congress in Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), *see* notes 42-45 and accompanying text *supra*, but has yet to rule on the effect of federalism upon federal courts' power to enjoin state legislators.

137 *See* 446 U.S. at 733. Although federalism does not bar a federal criminal prosecution of a statc legislator, the separation of powers doctrine does bar a federal criminal prosecution of a member of Congress. *See* United States v. Gillock, 445 U.S. 360 (1980); note 59 and accompanying text *supra*.

138 446 U.S. at 733. Thc Court's failure to articulate the standard it applied in determining that federal court interfercnce was unacceptable left the scope of the state legislator's immunity from federal court proceedings uncertain. This confusion can only lead to more litigation of similar claims. Such litigation will not only burden the federal court docket, but will pose an additional threat to the independence of state legislators as well. Until the Court articulates a coherent standard for analyzing immunity claims, state legislators will be burdened with the defense of these claims and influenced by the threat of possible liability.

139 The Court stated that if the plaintiffs had sued the Virginia legislature for refusing to amend the State Bar Code, the defendants would have been accorded legislative immunity. *Id.* This is the first case in which the Supreme Court has declared that state legislators enjoy immunity from injunctive suits. Previously, the circuit courts had divided on this issue. *See* notes 53-74 and accompanying text *supra*.

the defendants in *Consumers Union*.[140]

The Court failed to articulate a standard for second-tier analysis to explain this extension of state legislative immunity. Generally, the federal courts have a duty to provide a means of redressing violations of constitutional rights.[141] Constitutional violations by members of Congress are an exception; the doctrine of separation of powers, operating through the Speech or Debate Clause, prevents federal judicial action.[142] Federalism requires a similar limitation on federal court interference with state activity, but it will not shield state legislators from prosecutions for violations of constitutional rights.[143] Second-tier analysis ensures that federal courts protect constitutional rights, but limits federal court interference in other governmental activity. These are the same concerns that led the Supreme Court, through the *Younger* doctrine, to bar federal courts from enjoining alleged state violations of constitutional rights when an adequate state forum exists.[144]

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140 446 U.S. at 738.

141 *See* note 11 and accompanying text *supra*.

142 *See* note 13 and accompanying text *supra*.

143 *See* United States v. Gillock, 445 U.S. 360 (1980) and notes 58-64 and accompanying text *supra*.

144 *See* notes 31-33 and accompanying text *supra*. The *Younger* standards are not the only issues that face a court considering a request for an injunction against state legislative activities. Even if a plaintiff meets the *Younger* standards, principles of federalism may bar a federal court from issuing an injunction the terms of which will create an extensive and continuing intrusion into the state's legislative activity and thereby threaten the state's sovereignty. In Rizzo v. Goode, 423 U.S. 362 (1976), *supra* note 33, the Court indicated its unwillingness to sustain a federal court order that had directed local officials to institute a detailed plan for handling police misconduct grievances. In Milliken v. Bradley, 433 U.S. 267 (1977), the Court overturned a lower court desegregation order which provided extensive directions for local school board officials on mundane administrative matters. These decisions represent a recognition of the federalism issues raised by extensive entanglement of a federal court in the day-to-day affairs of local officials.

A similar problem might arise where an injunction against a state legislature creates a substantial restraint on legislative conduct. Consider a situation in which a state legislator, concerned with the effect of auto imports on the state's auto industry, introduces a bill to bar imported autos from the state's highways. The foreign manufacturer then seeks an injunction in federal court to bar scheduled hearings. The manufacturer satisfies the *Younger* requirements, demonstrating that the hearings will reduce the sales of imported autos even if the legislature takes no further action on the bill.

The injunction request presents the federal court with a dilemma. If the court grants the injunction, it will have protected the manufacturer's constitutional rights at the cost of limiting the state legislature's power to control its own agenda—a substantial infringement on state sovereignty. Alternatively, if the court denies the injunction, it will have preserved state sovereignty at the cost of allowing the state to violate a citizen's constitutional rights.

No legal standard provides an adequate gnide for a court confronted with this dilemma. Essentially, the court must weigh the equities in each case. The court might consider the nature and extent of the injury thrcatened to the plaintiff and the plaintiff's ability to limit its injury. The court might also consider the history of similar legislative activities and the legislature's "good faith" in scheduling the hearings. Except in the unusual case of limited harm to the plaintiff and a substantial infringement on legislative prerogative, the federal court should issue the injunction, taking care to frame its terms as narrowly as possible.

Jordan v. Hutcheson[145] illustrates the threat that absolute state legislative immunity would pose to federal courts' capacity to redress state violations of constitutional rights. In *Jordan*, a case decided seven years before *Younger*, the plaintiffs alleged that the state legislature had conducted a continuing investigation of their activities for the purpose of harassing them "in their efforts as lawyers to serve the cause of desegregation."[146] The Fourth Circuit determined that an injunction against the state legislature was appropriate.[147] In this situation, the *Younger* standards would have provided similar protection from state violation of constitutional rights. *Younger* bars a federal court injunction against pending state criminal proceedings unless the plaintiff demonstrates great and immediate irreparable harm.[148] The facts of *Jordan* indicate that the legislature's investigation caused substantial and continuing damage to the plaintiffs.[149] Because the investigation involved only legislative activity, an injunction against the legislature was the only means of protecting the plaintiffs' constitutional rights.[150] Thus, the *Younger* standards would permit a federal court to issue an injunction against the legislature when no other process could protect sufficiently the plaintiffs' constitutional rights.[151]

Application of the *Younger* standards to *Consumers Union* reveals the strength of the defendants' arguments for legislative immunity from injunction in that case.[152] The "great and immediate irreparable harm" required under *Younger* for an injunction to issue is absent. The threat of future prosecutions under the relevant regulation of the Code seems

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145 323 F.2d 597 (4th Cir. 1963); *see* notes 66-69 and accompanying text *supra*.

146 323 F.2d at 599.

147 *Id.* at 601. In *Consumers Union*, the Court implied that the Fourth Circuit position presented in *Jordan*—that legislative immunity does not bar injunctive suits against state legislators—is no longer valid. 446 U.S. at 732 n.10. This is because *Jordan* was decided before the Supreme Court held in Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), that members of Congress are immune from injunctive suits. The Supreme Court suggested in *Consumers Union* that this same immunity should extend to state legislators. *See* note 122 *supra*.

148 Younger v. Harris, 401 U.S. 37, 53 (1971); *see* notes 31-32 and accompanying text *supra*.

149 *See* 323 F.2d at 602-04.

150 In *Jordan*, the legislative activity directly interfered with the plaintiffs' constitutional rights. The federal court did not have the option of issuing an injunction against non-legislative officials to protect the plaintiffs' rights.

151 Leaving aside the question of sufficient harm to warrant issuance of an injunction, the availability of alternative relief would bar a federal court injunction under *Younger*. Thus, the *Younger* standards would not support issuance of a federal court injunction in Star Distribs., Ltd. v. Marino, 613 F.2d 4 (2d Cir. 1980), *see* notes 70-74 and accompanying text *supra*, because the plaintiff could have ignored the subpoena and raised its constitutional claim in a contempt proceeding. 613 F.2d at 7-8 & n.8.

152 *Younger* created a presumption against the issuance of federal court injunctive relief. *See* text accompanying note 30 *supra*. Consequently, a plaintiff seeking a federal court injunction under *Younger* must present a strong case for federal intervention:

largely hypothetical in *Consumers Union*.[153] Moreover, the availability of injunctive relief to prevent enforcement of the regulation provides an alternative and less intrusive means of protecting the plaintiff's constitutional rights than does an injunction against legislative activity.[154]

B. *Judicial Immunity from Injunctive Suits*

The Court in *Consumers Union* noted that the circuit courts are divided on the issue of whether judicial immunity bars injunctive relief,[155] but determined that it was unnecessary to resolve the issue in this case.[156] Dicta in the Court's opinion, however, suggest that state judicial activity in an area of inherent judicial authority justifies immunity from federal court injunction.[157] If the threat of interference with the exercise of inherent judicial authority in the area of rulemaking justifies immunity from injunctions, then other judicial activities, such as adjudication, would seem to deserve similar immunity.[158] As the judicial immunity cases have indicated, the threat of interference in the area of adjudication is especially great because of the need for integrity in adjudication and the dangers of undue influence in an area of close decisionmaking.[159] If interference with judicial rulemaking independently requires immunity from injunctions, then adjudication deserves at least the same protection.

The availability of appellate review generally will remove any threat to constitutional rights posed by official immunity,[160] but some threats will require other remedies.[161] In these situations, absolute immunity would prevent federal enforcement of constitutional rights. Federal courts might avoid this result in either of two ways. Future decisions might honor the limited nature of the *Consumers Union* holding

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153 The State Bar Association had expressed its belief that the regulation was unconstitutional.

154 The injunction against enforcement of the regulation removed the threat to constitutional rights without disturbing the state's legislative processes.

155 446 U.S. at 735. *See* notes 86-89 and accompanying text *supra*.

156 446 U.S. at 736. The Court noted that because the defendants were properly held liable in their enforcement capacities, there was no need to decide whether they were immune in their judicial capacities.

157 *See* notes 132-34 and accompanying text *supra*.

158 Neither the Supreme Court nor the courts of appeals have reached this result when addresing this issue. *See* notes 86-89 and accompanying text *supra*.

159 *See* notes 79-80 and accompanying text *supra*. Federal court interference with adjudication poses a greater threat of undue influence than does federal court interference with judicial rulemaking. The general application of rules assures the interest and involvement of many elements of the community in the rulemaking process. The influence of these groups will serve to diminish the influence of a federal judge on the legislative process. Adjudication, on the other hand, takes place in a relative vacuum. Generally, only the parties to the suit have a substantial interest in the outcome. Without these countervailing forces, a federal judge may exercise a greater influence on the outcome of the adjudication.

160 *See* notes 81-85 and accompanying text *supra*.

161 *See* Gerstein v. Pugh, 420 U.S. 103 (1975); note 32 *supra*.

by extending immunity only in cases in which a court concomitantly exercises inherent judicial authority and substantial rulemaking power.[162] Alternatively, federal courts might apply the *Younger* standards to determine when they have authority to enjoin state judicial activity.[163] *Consumers Union* is not a strong case for issuing an injunction under the *Younger* standards.[164] In a case in which a plaintiff is suffering actual harm and has no other remedy, however, a federal court injunction might be justified despite the state's substantial interest in the independence of its judicial proceedings.[165]

C. *Executive Immunity for Rulemaking*

Consumers Union may imply an expansion of immunity in the executive branch as well.[166] Viewed under the functional approach to official immunity, the decision suggests that defendants' immunity was triggered by their exercise of substantial rulemaking authority.[167] Under this functional analysis, a wide range of state and federal executive officials with delegated rulemaking responsibilities arguably could qualify for absolute legislative immunity.[168] This would mark a major depar-

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162 It is not apparent why these two factors, each by itself inadequate to bar a federal court injunction, would, when brought together, bar the exercise of federal judicial power. Regardless of this conceptual problem, courts might adopt this approach to avoid some of the practieal consequences of reading the decision too broadly.

163 For a discussion of the *Younger* standards, see notes 31-33 and accompanying text *supra*. The relevant inquiry in determining federal courts' authority to review state judicial activity focuses on the requirement of preserving state sovereignty. The *Younger* doctrine developed primarily in response to the needs of state sovereignty and federalism. Factors such as exercise of substantial rulemaking authority or inherent judicial power, while coinciding with important attributes of state sovereignty, relate only indirectly to the issue of sovereignty. The Court's emphasis on these factors serves to deflect its inquiry from the central issue of sovereignty.

164 *See* notes 153-54 and accompanying text *supra*.

165 *See, e.g.,* Gerstein v. Pugh, 420 U.S. 103 (1975).

166 Two considerations make executive immunity particularly important. First, since *Ex parte* Young, 209 U.S. 123 (1908), the primary method for challenging state laws has been suits for injunctions against the responsible executive officials. L. TRIBE, *supra* note 64, § 3-38. In *Consumers Union*, plaintiffs sought and received an injunction against the appropriate executive officials. 446 U.S. at 727. Second, executive action is often the final step in any governmental action. If executive officials are immune from judicial proceedings, the injured persons may get no opportunity to challenge the underlying authority for the executive action.

167 *See* notes 104-10 and accompanying text *supra*. The Court based its grant of immunity on the state court's inherent judicial power to regnlate the Bar as well as the legislative delegation of rulemaking authority to the state court. 446 U.S. at 734. The Court failed to specify, however, whether either justification standing alone would be a sufficient basis for immunity. *See* notes 132-34 and accompanying text *supra*. This leaves open the possibility that in future cases a simple exercise of rulemaking authority will be a sufficient justification for immunity. If courts narrowly interpret *Consumers Union*, however, they will require both a legislative delegation of rulemaking authority and inherent judicial authority before they will grant immunity.

168 Numerous executive officials exercise some measure of delegated legislative authority. *See, e.g.,* VA. CODE § 10-186 (1950) (duties of the Council on the Environment); *id.* § 12.1-12

ture from the Court's holdings in *Butz* and *Scheuer* limiting such officials to a qualified immunity defense for claims arising from their discretionary activities.[169]

CONCLUSION

Supreme Court of Virginia v. Consumers Union of the United States, Inc. reflects the Supreme Court's continuing uncertainty as to the scope of suggested official immunity. By failing to consider the constitutional roots of official immunity, the Court suggested several improper extensions of this doctrine. Under the suggested approach, the Court would have recognized the dissimilar requirements of judicial deference imposed by the separation of powers doctrine and federalism. Unlike separation of powers doctrine, federalism does not always require judicial deference in cases involving threats to constitutionally guaranteed rights. The *Younger* doctrine suggests a useful standard for determining when interests of comity should yield to federal courts' responsibility to protect constitutional rights.

Consumers Union's discussion of legislative immunity is subject to a range of interpretations. At most, it stands for the proposition that state legislative immunity is virtually equal to congressional immunity. At the least, it stands for the proposition that state legislators are immune from federal court injunctions when federally guaranteed rights are only theoretically implicated. Application of the *Younger* standards in future cases will return legislative immunity to its constitutional roots and provide a coherent standard for deciding these cases.

Depending on the relationship between the two factors underlying the Court's decision to extend legislative immunity to state court judges—the Virginia Court's exercise of inherent judicial authority as well as its rulemaking power—the Court's reasoning might be applied to extend absolute immunity to a wide range of executive and judicial functions. Because this extension would ignore constitutional limits to judicial deference, courts should interpret the decision narrowly.

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(duties of the State Corporation Commission); *id.* § 63.1-25 (rulemaking power of the State Board of Welfare). The enabling statute carefully circumscribes the area of the Virginia Court's authority. For example, the Virginia Court could not allow first or second year law students to engage in the practice of law. *See id.* § 54-48.

169 *See* notes 90-103 and accompanying text *supra*. In *Consumers Union*, the Court expressly held the defendant judges liable in their enforcement capacities, 446 U.S. at 736, just as other executive officials are liable in their enforcement capacities. *Id.* Therefore, the only implications of an expansion of immunity under the functional approach would be in the class of executive officials amenable to suit. Although expanded immunity would shield those officials exercising rulemaking responsibilities, these same officials might be liable in their enforcement capacities.